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CONTROLLING OBSCENITY BY ADMINISTRATIVE TRIBUNAL. A STUDY OF THE ONTARIO BOARD OF CINEMA CENSORS

STAN MAKUCH*

A. INTRODUCTION

"The flesh is sad alas! and I have read all the books!" We shall soon be saying: "I have seen all the films and the flesh is sad, alas!"¹

This prediction was made in September 1969, to a conference of the Eight Provincial Censorship Boards of Canada, and seems to be indicative of the trend in motion pictures today. A cursory glance of any newspaper page of advertisements for motion pictures will reveal an array of sex and violence. The motion picture voted best movie of the year in 1969 not only contained violence and brutality but homosexuality and nudity. This motion picture was shown in Ontario without elimination of any scenes. In contrast a memorandum of the Censor Board dated September 17th, 1926 stated that among other scenes eliminated from the film, *The Gay Deceiver*, was a shot of a "youth's and girl's shoes together under a bed."²

The Board which made the cut in 1926 and the Board which allowed the uncensored playing of *Midnight Cowboy* in 1969 were both to perform the function of censoring movies and that function has been performed in virtually the same way throughout the years, the Board views the film and decides on whether it should be allowed to be shown and under what circumstances; yet the results of that function are radically different. This paper will attempt to show why that is so. It will examine the stated goals of the organization both in 1911, when it was first instituted, and today. The formal structure will also be examined, and an attempt will be made to indicate how the goals and functioning of the Board were influenced by that structure. Thirdly, an analysis will be made of the Board's work flow process to ascertain its influence on and relationship with the Board's achievements. In examining the variations in what the Board has been attempting to do during its existence, and the methods by which it sought to achieve these ends, reference must be made to external forces; that is the environment of this organization must be studied to discover how social climate and technological change affected the Censor Board and played a role in bringing it to its present position. Finally the draft legislation to reform the organization will be examined and some evaluation will be made not only of its effectiveness and need, but of the value of the Board itself.

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¹ M. le bâtonnier Yves Prevost, C.R., addressing the Eighth Interprovincial Conference of Film Classification Boards of Canada, Tuesday, September 16, 1969.

² Treasury Department Records 1-8; Box 1, Moving Pictures Censor's File 2. Memorandum for the Treasurer (from J.C. Boylen). September 27, 1926.

B. GOALS

Defining the goals of any Board would seem to be a most difficult task, not only because goals are not static but also because the definition of the goals will vary according to whom is postulating them, so that any definition of goals must be put in the context of who is offering it. Although the definition might be placed in the context of each individual in society this paper will examine it from the point of view of four constituencies. These are, the public generally; the legislature which enacted and maintains the legislation for the Board's existence; the industry which the Board regulates, and the members of the Board itself.

(i) *The Public*

The public's view of what the Board is attempting to do is perhaps the most difficult to ascertain unless one has the facilities to conduct extensive questioning based on social science techniques. As well, the views of the public will vary widely, from the libertarian who would have the Board cut paper dolls instead of films, to the staunch conservative who thinks the censor's scissors are too dull.

However a random sampling of letters written to the Board gives some indication of its purpose from the point of view of the public who feel it has a legitimate function. The views of those writing in the 1920's and of those writing today are virtually identical. The belief is that the Censors must protect society and especially the young from concepts and ideas that might adversely affect them. For example, part of a recent letter³ read as follows:

At a time when our town is really sick with vice, dope, alcohol and immorality, it would seem to me that the (film theatres) would try to improve the calibre of the next generation of citizens, rather than feed them garbage. There are also many broken homes and so much heartache and unhappiness in this town. . . . Certainly showing films of this type as were shown yesterday (Midnight Cowboy) do not help to make (our town) a better place in which to live or raise our children.⁴

It would seem that any rationale to justify the Censors from the public's point of view would have to embody this attitude. The Board's function, then, would be to help maintain basic values which form the fabric of society and indeed to try to encourage the development of higher standards of behaviour, especially among the young. This use of the mass media was condoned by the Progress Report of the *National Commission on the Causes and Prevention of Violence*.⁵

This point of view has not drastically changed from that of those concerned about censorship in the earlier part of the century. Dr. O.A. Cannon of Hamilton, Ontario, wrote the Board in September 20, 1926 condemning the Censors for allowing *The Penalty* to be shown. "The picture had no redeeming feature.

³ This letter was copied from the files of one of the major exchanges because the Censor Board would not allow any letters to be copied. This letter however is typical of those received by the Board.

⁴ Dated, January 12, 1970.

⁵ Washington G.P.O., 1969. Dr. Marie-Andrée Bertrand in a speech entitled *Film Violence and Juvenile Delinquency* at the Congrès Interprovincial des Bureaux de Surveillance du Cinema Canadien Montreal 17-18 September, 1969 made reference to the Commission.

It shows no art, no beauty, teaches no lesson, and gives no information. . . . Surely the Censors are failing their duty as this picture can do nothing but harm the Canadian youth."⁶

It is suggested that these excerpts indicate the goal that those in society advocating censorship espouse for the Board. Those citizens see censorship as playing an active role in maintaining if not uplifting the moral, ethical, and social standards of the community which made it possible for us to share a common social and political life. These basic values have not changed considerably since the incorporation of the Board although the number of citizens eager to protect them through censorship has probably diminished substantially.

(ii) *The Government*

It is to be assumed that under a democratic system of government legislative enactments follow to a considerable degree the popular wish and that, as a result, the act and regulations under which the Board operates reflects the goals of the public.

In 1911, although information is sketchy there was apparently an active campaign under the auspices of the *Social and Moral Reform Association*⁷ for the enactment of censorship legislation. The debate in the Assembly reflected the concerns mentioned and the Premier stated that until recently he had not been aware of the evil connected with motion pictures; great concern was also expressed about the influence of films on the young.⁸ With these goals in mind, the protection of society and its youth from moral disintegration and the stimulation of higher standards of conduct and thought, a Censorship Board was created under the control of the Treasurer of the province. It was given the power "to permit the exhibition or absolutely prohibit or reject all films"⁹ to be shown in the province.

The original regulation governing the Board's activity stated: "No picture of an immoral or obscene nature or depicting crime or pictures reproducing a prize fight shall be passed by the said Board or shown or exhibited."¹⁰ It appears that the government's goal was, as mentioned above, to protect society. Although this Order In Council was repealed on May 7, 1918 and the Board was to have a "completely free hand to permit or refuse any film,"¹¹ the minister in charge of the Board did not neglect to take an active part in its affairs. An appeal committee composed of the minister, his secretary and one other was established¹² while the flow of memorandum between the minister and the Board was constant and voluminous.¹³

⁶ Treasury Department Records 1-8; Box 1, Moving Pictures Censor's File 1. Dr. O.A. Cannon (to the Attorney-General of Ontario), September 30, 1926.

⁷ *Mail and Empire*, Saturday, March 11, 1911 at 4.

⁸ *Id.*

⁹ An Act to Regulate Halls, Theatres, and Cinematographs, S.O. 1911, C.73.

¹⁰ Order In Council June 11, 1911, *Moving Pictures*; Treasury Department Records 1-8; Box 1, Moving Pictures Censor's File 1.

¹¹ Treasury Department Records 1-8; Box 1, Moving Pictures Censor's File 1. Memorandum to the Attorney-General, November 27, 1919.

¹² *Id.*

¹³ Treasury Department Records 1-8; Boxes 1-5, Moving Pictures Censor's Files.

The Treasurer, in outlining government policies regarding the Board, in a published article, saw its objectives as important to Ontario society:

The screen has no language but has unlimited power of expression, through the eye, it molds the mind, directs the thought, advertises styles and fashions as well as attracts trade and immigration. Not only do they entertain and amuse, but instruct and educate as well. . . . The great importance of the film of the present day on the public mind cannot be minimized. The constant viewing of films by our people is destined to exert a decidedly moral and social influence as well as to stamp on the mind of the public certain impressions it might or might not be wisdom to allow. For these reasons it is the opinion of the government that a censor board is essential to stand between the exchanges and the theatrical exhibitions that screen for the public.¹⁴

To this may be contrasted the objectives that the government has for the Board today. The Act has not changed substantially from the Act of 1911. The Theatres Act¹⁵ states there shall be a board known as the Board of Censors and its operating authority can be found in Section 3, subsection 2. The Board under that section has power to:

- (a) censor any film and, when authorized by the person who submits film to the Board for approval, remove by cutting or otherwise from the film any portion thereof that it does not approve of for exhibition in Ontario.
- (b) subject to the regulations, to approve, prohibit or regulate the exhibition of any film in Ontario.

The recent regulations give little indication of different objects than those originally postulated for the Board. There are no statements, as in the early regulations, about criteria for the Board which might indicate the legislature's view of the Board's objectives. Rather the only indication regarding goals is that where films have been classified adult or restricted, signs must indicate so on theatres and in advertisements.¹⁶

From the word "classify" it is possible to discern, however, that the objectives of the Board at least in the government's eyes has changed, although for the most part, the legislation and regulations postulate no goals or objectives. The only recent official and public statement by the Minister of Tourism, was made in the Provincial Assembly in 1964:

. . . Perhaps I could sum it up this way. What we are doing in Ontario and have been doing for some time, is to establish a system of classification. I think every member would agree that what is one man's meat is another man's poison. . . . There will, I think, always be a difference of opinion, and I think that the system of classification whereby the viewer or patron can get a fairly good idea of what kind of film it is before they go in, is probably the best one that we will reach.¹⁷

The objectives for the Board then, envisaged by the government, do not correspond to the government's original goal in setting up this Board. The belief in the importance of the film and the need to control it have vanished to be replaced by the much more liberal view that "one man's meat is another man's poison." (An attempt will be made later to discuss the reasons for such a change and the influence of that change on the Board.) Indeed this limited goal may be non-existent for it should be pointed out that in the late 1960's the

¹⁴ *London Free Press*, February 7, 1928 at 6.

¹⁵ Theatres Act, R.S.O. 1960, C. 396.

¹⁶ Revised Regulations of Ontario, 1960, as amended by Ont. Reg. 140/63, Reg. 554, 59, 60.

¹⁷ Ontario Legislative Debates, April 15, 1964, 2100, 2101.

Minister of Tourism approached the Film Distributors Association of Canada asking it to engage the industry in setting up its own censorship. The Association, however, was unable to devise any scheme.¹⁸

(iii) *The Industry*

The goals which the industry desires for the Board may now be examined. These have not varied between the Board's inception and today. Throughout the Board's history, the objective the industry wished to achieve was certainty and security.

In 1911 before the Board was instituted, each municipality had its own censor and a film accepted in one municipality might well be rejected in another. The result, as pointed out by the *Toronto Globe* in 1911, was that "promoters of picture theatres are in a state of uncertainty as to whether the films they are about to exhibit will be approved or not. . . . To do away with this condition the Provincial Treasurer is working upon a plan to have central inspection of the films."¹⁹ The industry therefore, was anxious that such a Board be set up to regulate the industry.

In the 1920's the President of the Motion Picture Distributors Association, although highly critical of the Board wrote: "If the Ontario Board of Censors were abolished it would be necessary for us to establish our own censorship in order to make sure that nothing was circulated which would arouse public indignation or which would bring the theatre owners in danger of the law."²⁰ Here the objective is only varied slightly for the industry was still concerned with certainty but also with protection from police and the Criminal Code.²¹

This concern has continued to the present day. The film distributors wish to use the Board to attain protection from the criminal sanction.²² As the president of one film exchange²³ succinctly put it "Once a picture is passed by them, . . . no more nonsense . . . so the Board helps regulate things."²⁴ The manager of another exchange expressed a similar view, "We prefer it to having to protect ourselves from every police chief and prosecution under the Criminal Code."²⁵

¹⁸ Interview with the General Manager of a large exchange in Toronto, March 2, 1970. It should be noted that the names of those interviewed are withheld, at their request, throughout this paper.

¹⁹ *Toronto Globe*, January 14, 1911, at 3.

²⁰ Treasury Department Records 1-8; Box 2, Moving Picture Censor's File 2. J.C. Cooper's Letters File 1. John C. Cooper letter, January 13, 1927.

²¹ Criminal Code, R.S.C. 1927, C. 36, s. 208.

Every person who, being the lessee, agent or person in charge or manager of a theatre, presents or gives or allows to be presented or given therein any immoral, indecent, or obscene play, opera, concert, acrobatic variety, or vaudeville performance, or other entertainment or representation, is guilty of an offence punishable on indictment or on summary conviction, and liable, if convicted upon indictment, to one year's imprisonment with or without hard labour, or to a fine of five hundred dollars, or to both, and, on summary conviction, to six months' imprisonment, or to a fine of fifty dollars, or to both.

²² Criminal Code R.S.C. 1970, C. c-33 s. 159.

²³ This exchange was shown by the Confidential Reports of the Board to be the exchange with the highest number of eliminations and banned movies.

²⁴ Interview on March 2, 1970.

²⁵ *Id.*

One Member of the Board itself, concurred that this was the reason that the industry wanted the Board. He felt that the distribution companies, (or exchanges, as they are called in the trade) view with trepidation numerous and costly lawsuits which occur in the United States and wish to prevent such activities in Ontario.²⁶ This, it is suggested, could well be the reason for the Distributors Association's refusal to create its own board when asked by the Minister. Such an organization with no legal status would give no protection from the police and the courts and therefore would be of little use.

There is however, a new dimension to the industry's concept of regulation as an objective for the Board. A concrete example has arisen recently with the advent of Canada's first video-tape theatre which, because of the use of tape and not film, is beyond the scope of the Censor's jurisdiction. This theatre's (Theatre 2000) first tape was entitled *Vixen* and apparently went far beyond that which the Board was willing to allow and was thus creating serious competition and upsetting the markets of the other distributors.²⁷ The President of the Motion Picture Distributors Association wrote the Minister of Tourism: "I therefore would appreciate it if you would accept this letter as a formal request that the same rules and regulations apply to motion pictures shown on tape where admissions are charged."²⁸ The distributors thus see another objective to be reached; that of equity and uniformity. All distributors must be governed and regulated by the same rules to ensure orderly and equal competition among themselves and freedom from the criminal sanction.

Those goals postulated by the industry appear, however, to correspond with those stated by the Minister, for the industry does not wish that movies be cut or banned, but rather wishes the Board, as the Minister suggested, simply to classify without censoring.²⁹ It would seem that in this way the exchanges would achieve their ultimate goal of protection from the law without the price of censorship or control; their motion pictures would simply be rated General, Adult or Restricted.

(iv) *The Board*

Having canvassed the views of those who surround the Censors as to what that Board should seek to be doing, the Board itself may be examined. Here again an historical approach will be taken to show how the goals have changed over the years to a goal which resembles in part, that of industry.

The very early years of the Board are lost to the researcher as there are no substantial files on the Board prior to the 1920's. However, it can be assumed that the Board, being newly instituted, had objectives which correspond fairly closely with those of the government and society at large. This is reflected in an early pamphlet published by the Board called, *Standards of Field and Work of the Ontario Board of Censors of Moving Pictures*.³⁰

²⁶ Interview on March 5, 1970.

²⁷ *Id.*

²⁸ Letter to the Hon. Mr. Auld, January 14, 1970, in the Board of Censor's present files.

²⁹ See note 108.

³⁰ Treasury Department Records 1-8; Box 2, Moving Pictures Censor's File 1, issued March 1, 1921 by Major A.S. Hamilton, Chairman.

The first paragraph of the work outlined the Board's general policy:

The Ontario Board of Censors realizes the educational and recreational value of Moving Pictures, and will endeavour to save all pictures possible. In so doing it will try to make its judgments from the standpoint of a normal Ontario audience, basing its decisions on the fundamental principles laid down by the respectable and law-abiding general public. The above implies the purpose of the Board to be the excluding of the degrading, the immoral, the improperly suggestive, the harmful and the indecent, and will deal with all pictures accordingly.³¹

The remainder of the pamphlet contains specific illustrations of what the Board would not allow. Fifteen different categories were included from the displaying of American flags, to cruelty towards animals; and, from the showing of drugs, to "scenes of the underworld, questionable resorts, etc., drinking scenes, women smoking and drinking."³²

The conclusion of the pamphlet was summed up appropriately in a paragraph entitled, "The Future":

The Board's decisions should in the future, if above standards are adhered to, bring the Moving Pictures to a higher level in the Province of Ontario. The producers, too, are increasingly realizing that the community at large demand good, clean pictures, and with the Board's insistence on such, the public of Ontario may expect to have productions which are pleasant, instructive and educational.³³

The exhortation of the pamphlet would certainly ring hollow to the Members of the Board if they were able to see the movies allowed today. The Board today does not attempt to achieve so bold an objective.

The letterhead on the confidential reports of the present Board to the Minister no longer, as in the past refers to the *Board of Censors of Moving Pictures*,³⁴ rather "Ontario Classification Board" is the new title, for confidential purposes at least. The title of the published Annual Report does not even contain that hint of what the Board is attempting to do; rather it simply states "Theatres Branch".³⁵ The censors are no longer seeking to achieve their old objectives and generally as the Minister pointed out in the House their "raison d'être" seems to be classification.

Three members of the present Board were interviewed to ascertain what they felt they were attempting to do.

The first, a censor who views himself as the most liberal member of the Board, felt the Board was attempting to reflect the attitudes of society in general in order to classify movies and believed that to do more would be unfair because it would impose general social standards on movie goers, a particular group in society. He added, that classification only benefited the young, for they would not be admitted to see certain films.³⁶

The second censor interviewed, the newest member of the Board, felt also that he too must attempt to classify on the basis of what the public wanted in order that he might monitor films to warn the public who would be exposed to

³¹ *Id.* at 1.

³² *Id.* at 7.

³³ *Id.* at 8.

³⁴ See Treasury Department Records 1-8; Box 1, Moving Pictures Censor's File 1, an early memorandum.

³⁵ 1969 Annual Report, Ontario Department of Tourism, Theatres Branch.

³⁶ Interview on March 12, 1970.

various degrees of nudity.³⁷ The third member interviewed who had been with the Board since the late 1920's, also felt classification was the Board's major purpose. Classification was the answer to parents who wished to take children to see motion pictures. It protected the public from being offended since the viewer would know by classification whether a film should be viewed or not.³⁸

All three members then viewed classification as an objective of the Board and differed only in their reasons for classification. One felt classification was to give more freedom to the public so they might see what they wished, whereas the second felt that he was trying simply to inform people of what they would be seeing, while the third saw the Board's objective in terms of warning the young but added the goal of protecting movie-goers from embarrassment.

The espoused goals of this organization, in summary, seem to be to convey information to the public as to the type of film being shown. These goals obviously are strikingly different from the objectives of not only the Board and public in 1911, but also of the contemporary public who see a need for a Board today.

(v) *Goal Displacement*

Those who have advocated censorship in the past, and those who do so today, see it as a much more positive force. Indeed, their views can be reconciled with those of such people as Lord Devlin, in that they believe that every community must rest upon moral agreement about fundamental matters. Their goal would be the protection of society through the protection of certain values and censorship would be one method to accomplish that end:

A society functions only if its members share a common body of values, and back of it a common ethos. This permits some divergencies but also requires the society, if it is to remain viable, to protect the essential shared values. If this proposition is correct, as I believe, then Jefferson's society—which protects coercively only freedom, allowing people to make any use of it they want (to pursue and cultivate any values) as long as it does not interfere with the freedom of others—is an ideal that cannot be practiced. . . . The ethos may permit liberties—but not to the extent of endangering it. Certainly the right of censorship is implied. Within limits freedom may be part of the ethos. But the ethos must include values beyond the mere universal distribution of the ability to choose (freedom), and these must be protected.³⁹

This statement, it is argued, is the only goal that censorship can legitimately seek to achieve in a liberal democratic society⁴⁰ and it can be viewed as the philosophical rationale for the views of those arguing for a potent and meaningful censorship. Seen in this way, the government, the Board and probably a majority of our society today have abandoned that only legitimate objective of censorship. Because of their default, the Board had only the goals of industry after which to seek. The Board classifies for the film industry and knowingly, although not as a conscious objective, protects and regulates industry. The exchanges are protected from the criminal process, from the police and to a great extent from the public, since the Board is the industry's public relations

³⁷ Interview on March 11, 1970.

³⁸ Interview on March 17, 1970.

³⁹ Ernest van den Haag, "Quia Ineptum, To Deprave and Corrupt", J. Chandos, ed. at 113-114 as quoted in Clor, *Obscenity and Public Morality*, (Chicago: University of Chicago Press, 1969) 184.

⁴⁰ See generally H. Clor, *supra* note 39, ch. 5.

officer and intermediary with the public. With the proposed amendment to the *Theatres Act*, the censor will obtain charge over video-tapes and so serve the industry's objectives in the area of economic regulation as well.

There can be no doubt that the Board is the victim of goal displacement; an examination may now be made of why the phenomenon took place. This will include a study of the formal internal organization and structure of the Board to understand if they have had any appreciable effect on the functioning of the body.

C. ORGANIZATION AND STRUCTURE OF THE BOARD

From its inception the Censor Board was not so large that it required any elaborate or formal structure. Its organization has consisted throughout the years of a small number of censors varying in number from three to five plus a chairman. These individuals were aided by an office staff. The Chairman has also been responsible for the Theatres Inspection Branch of the Board and the inspectors in that division. That aspect of the Chairman's jurisdiction is beyond the scope of this paper and suffice it to say that the Inspection Branch enforces safety, health and fire regulations concerning the theatres.⁴¹

Because of minimal vertical organization within the Board, two aspects of the Board's structure would seem to become of more importance. The first is the character of the individuals involved and the second is the relationship of the Board with the Minister responsible for the Board.

(i) *Individuals on the Board*

Any attempt to judge the competence of early or more contemporary members from very limited information can be misleading so the information known of these people will be stated and only a few comments made.

The earliest records of the Board date back to the beginning of the 1920's in a memorandum to the Minister which stated that the Board, as it was then constituted, had been in office a little over a year. The Chairman was A.S. Hamilton who had wide commercial knowledge and general knowledge of the film business. J.C. Boylen and I.J. O'Connor were the two male censors: the former had been a secretary in the Department of Agriculture and had also been previously involved in journalism, and the latter had made a study of motion pictures and had a wide knowledge of this field. The memorandum stated, that Mrs. Phillips was a mature woman with years of experience in journalism, while the other feminine representative was Miss Hamill, a university graduate and Y.W.C.A. worker. One of the men and one of the ladies viewed each film, with the right of an appeal to the other three.⁴²

These members it seems, formed a fairly closely knit group. For example, in September of 1921 they travelled to Los Angeles together to meet with

⁴¹ Theatres Act, R.S.O 1960, c. 396, s. 11-27.

⁴² Treasury Department Records 1-8; Box 1, Moving Pictures Censor's File 1, Memorandum from Boylen to Treasurer Smith, June 21, 1922.

American and Canadian censors.⁴³ Their individual reports and evaluations of that trip show a remarkable homogeneity in the need to protect Canadian and British values from American encroachments, as well as a common outlook on the inclusion of scenes of crime, violence, sex, etc.⁴⁴

In that same year the Canadian Motion Picture Distributors Association published a pamphlet entitled *Motion Picture and Public Opinion*,⁴⁵ which stated that films were not the cause of social ills and that there was a need to safeguard freedom by abolishing censorship. The Board responded with a written reply which was signed personally by all its members. The document asserted "An examination by anybody of the eliminations made from films by this Board will show what need there is for censorship."⁴⁶ In reply to specific suggestions that the Board's name be changed the Report urged "If amending the Act to make the phrase, 'Board of Censors' read 'Motion Picture Commission' is merely a first step of an organized effort to reduce the powers of the Board and to limit them to those of an advisory character, then the Motion Picture interests have accomplished their purpose to keep the question of censorship in a continued state of agitation."⁴⁷ The reply then continued "'Standards' and 'General Instructions' are used as contrasting terms for the purpose of attacking the efforts of the Board to obey the Act."⁴⁸

At least one tentative conclusion may be drawn from these sketchy facts. It is that in order for a Board to attempt to achieve the objectives of the legislation, members must be appointed who firmly believe in those objectives. In this early time every member of the Board can be said to have believed in the value and utility, indeed, the vital importance of censorship as a means to protect society.

This may be contrasted to the attitude of the present Board. Having gone to the Board's offices many times, it can be said that no sure unifying spirit as above exists nor is there the same attitude towards the original objectives of the Board. Mention has already been made of the unofficial change in the Board's name, an idea which the Board in its early years strenuously shunned. The Board today allows no one officially to examine the eliminations it makes in contrast to the call for examination in years gone by.

All members of the Board constantly refuse to speak publicly about what they are doing and indeed, are very hesitant to speak privately. Interviews failed to indicate any strong belief in the goals of real censorship or even classification. In fact, as pointed out, one censor rejected the need for censorship altogether.⁴⁹ All this would seem to indicate that the present members do not have any philosophical or moral rationale as a basis for what they are doing. There is no strong belief that their's is a worthwhile or important function or that it benefits society. If the attitude of the members of a board is an important factor in the

⁴³ Treasury Department Records 1-8; Box 1, Motion Pictures Censor's File 1, Memorandum from Boylen to Treasurer Smith, June 13, 1922.

⁴⁴ *Id.*

⁴⁵ Treasury Department Records 1-8; Box 3, Motion Pictures Censor's File 1.

⁴⁶ *Id.* at 1 of a reply, undated.

⁴⁷ *Id.* at 3.

⁴⁸ *Id.*

⁴⁹ Interview on March 5, 1970.

effectiveness of it as a meaningful organization, the attitude of the members of the present Board indicate one reason for its goal displacement.

(ii) *Ministerial Control*

The attitude of the Board has been created by many and sundry influences, some external to the Board, some internal, but it is also affected, it would seem, by its structure in so far as the Board is, through its Chairman, directly responsible to a minister who may have a profound influence upon it. From its inception, until the early 1920's, the Board was under the supervision of the Treasury Department after which it came under the Department of Tourism and Information. Control and responsibility throughout its history, it seems, were direct and close, as a constant flow of communication can be seen in the files, and even today the Chairman makes monthly reports to the Minister. As well, appeals from the Board were always in the hands of the Minister.

In the period prior to August of 1934 there appears to be nothing in the files to suggest the Minister's lack of confidence in the Board or any political embarrassment on the part of the government because of the Board. Whenever the Minister received a request for an appeal he invariably asked the Board to re-examine the film. In spite of the fact that throughout this period there was a steady stream of correspondence from the Motion Pictures Distribution Association President, asking the Minister to intervene on behalf of the industry, the Minister allowed the Board the authority to censor without interference.⁵⁰ The most serious challenge of the Board by the Minister can be found in May of 1926 when Doctor Montieth, the Treasurer at the time, asked the Chairman to explain why the Board rejected a film in 1926 which it had approved in 1921.⁵¹ While giving this private support to the Board, the Minister, as well, as noted above, supported the censors publicly in a published article and public speeches.⁵²

The ministerial support which seemed to have existed throughout this long period of Conservative Party control of the province, changed in 1934 when the Liberal Party under Mitchell Hepburn came to power. The Hon. Mr. Hepburn immediately proceeded to implement his campaign promise, "The first job is to overhaul the machinery of government. That means two things as I see it. First eliminate inefficiency—rip out the dead wood, political appointees, hangers-on, those who draw big salaries for doing little."⁵³ In accomplishing this he cut the Board from six members to three. The former chairman, J.C. Boylen was retired without a pension after long years of service, in spite of pleas from many individuals in the province.⁵⁴ The firing of another member, Mrs. Moran was justified on the grounds that she was a "rabid Tory".⁵⁵ Meanwhile the appointment of a new member and chairman occurred.

⁵⁰ See Treasury Department Records 1-8; Moving Picture Censor's Files.

⁵¹ Treasury Department Records 1-8; Box 3, Motion Picture Censor's File 1, Letter Montieth to Cooper, May 1, 1926.

⁵² See note 14.

⁵³ McKunty, *Mitchell Hepburn* (Toronto: McLelland Stewart, 1967) 61.

⁵⁴ Hepburn Papers, Private Correspondence 1934, Rg. 3, Board of Censors. Confidential Memorandum to Hepburn, undated.

⁵⁵ *Id.*

Just after the flamboyant Mitch Hepburn was elected . . . in March 1934, he wired an old family friend who, Mitch recalled, wanted a civil service job. The friend was a bored business school teacher of 25 named Omie J. Silverthorne . . . Hepburn's telegram offered 'a post in the Provincial Treasury' which, although Silverthorne was not aware of it, supervised the Censor Board . . . 'O.J. you're going to be a film censor,' said Hepburn. 'If you're a good boy, the government will give you a pension in 20 years.'⁵⁶

A new era for the Board then began, with the Premier controlling more and more of the Board's operation. Appeals now went to him and a small group chosen by him as advisors. In 1935 Hepburn sent letters to the presidents of all the film exchanges explaining these changes and asking them of their opinion of the new Board.⁵⁷

Their replies all praised the new censors. H. Bailey, President of Fox, wrote: "We are receiving wonderful co-operation from the Board and there is no suggestion that I could possibly offer for any improvement",⁵⁸ and thus indicated the affect that the new Premier had on the Board's ability to control the industry in a meaningful way. Hepburn did not encourage strict censorship and was more interested in working with the industry as it was aiding in the production and distribution of a promotional film about Ontario. The motion picture "Vacationing in Quintupletland" was to have 160 copies distributed throughout North America and the Commonwealth.⁵⁹

Hepburn's control was felt in another way, in that he did not feel that motion pictures had to be censored to any great extent. "The pictures are so thoroughly censored in the United States before they reach this country that it is almost unnecessary for us to censor them again,"⁶⁰ he wrote in 1936. The Board, therefore, lost much of the leadership and support it needed to carry out the goals initially perceived by the legislation. The censors, brought directly under the Premier's office during this period could not exercise any independent control or judgment, the fate of previous members indicated that. The Premier, it could not be said, supported them in their tasks; for he even questioned the need for the censors. One of the more important functions of the Board in the 1920's and early 1930's had been to attempt the preservation of a Canadian (and British) identity. Hepburn the Liberal continentalist who voted in favour of reciprocity as an M.P. in Ottawa felt that U.S. censorship would suffice.⁶¹

The ultimate blow to the Board came during the Second World War when Hepburn used the censors as a political tool in his fight with the Federal Liberals of MacKenzie King. Hepburn used the Board to ban the film *Inside Fighting Canada* (a movie produced by the federal government to inform and encourage

⁵⁶ Walker, "A Much Needed Defence of those Tireless Public Servants", *Toronto Life*, March 1969 at 49.

⁵⁷ See note 54.

⁵⁸ Hepburn Papers, Public General Correspondence, 1935, Rg. 3, Board of Censors. Letter from Bailey, February 14, 1938.

⁵⁹ Hepburn Papers, Private Correspondence 1938, Motion Pictures. Letter from J. Burnes, February 16, 1938.

⁶⁰ Hepburn Papers, Public, General Correspondence, Rg. 3, Board of Censors. Letter to Mrs. J. Alex McKenzie.

⁶¹ *Id.*

the public in the war effort), against the wishes of Mr. Silverthorne.⁶² Similar action was taken in 1943 against *Canada Carries On*, a similar movie.

The Board's internal structure, involving close control by the Minister, had made it vulnerable to uses different from those originally intended. The Minister was able to use it for political purposes, or in order to woo the industry for propaganda purposes, indeed he was able to use it for his own personal disagreements. The effect of such a structure combined with poor ministerial leadership and the members' uncertainty of tenure can be seen by comparing the goals of the Board immediately before and after Hepburn's reorganization.

Boylen wrote to Hepburn in 1934, before the former was dismissed, about the need to protect Canada from American films, "As Canada and the United States are one country so far as trade is concerned and as over 90% of the films are imported from the United States the need for a Board or similar supervising authority is evident."⁶³ This view that room must be left for the development of a Canadian and British identity is also discussed at length in the 1933 Annual Report of the Board. In 1936 the Annual Report made no mention of protecting or fostering the growth of a Canadian spirit and the Board which had a reputation in 1933 as being "the toughest in Canada"⁶⁴ did not reject any films at all.

It was during this period that the general goal of maintaining an ethos in which essential and common values were protected was first displaced by the goal of classification. Mr. Silverthorne in concluding his 1936 Report made the following statement:

There still appears to be a large section of the public throughout the country, who are still unaware that the Board has, *from its inception, always* made a distinction between films that are suitable for children and those intended for adult audiences. Two certificates are issued, one for "Universal" exhibition and the second, suitable for adult audiences.⁶⁵ (italics added)

Although this did not end rejections or censorship in Ontario completely, it spelled the end of any meaningful goal for that body. Attempts that the old Board had made to set percentage requirements for Canadian or British films shown in theatres in order to foster a Canadian identity were forgotten. Classification became the new goal of the Board rather than the preservation of a certain ethos and essential values which might support a Canadian nation.

This new approach has continued to the present day. The Board has been encouraged by the various ministers to classify rather than censor. They have not provided any effective leadership or support in terms of the original goals of the Board. One member of the Board pointed out a threat of appeal to the Minister is often sufficient to exact concessions from the censors; for the Minister does not wish to be involved in such a sensitive issue.⁶⁶ A former minister's cavalier attitude towards the Board's objectives and importance can be seen in the calling of a party by the minister in early 1970 for the press and members

⁶² Hepburn Papers, Public, General Correspondence 1942, Board of Censors. Memorandum to Silverthorne, December 28, 1942.

⁶³ Hepburn Papers, Private Correspondence 1934, Rg. 3, Board of Censors. Memorandum from Boylen, August 3, 1934.

⁶⁴ *Id.*

⁶⁵ *Annual Report of the Board of Cinema Censors* (1936) 4.

⁶⁶ Interview on March 17, 1970.

of the industry at the Board's offices to show recent cuts which the Board had made.⁶⁷ Apparently that Minister as well, wished to have a good rapport with the industry for the purposes of publicizing the province. The recent distribution of the "Wonders of Ontario" was suggested an example of this by the general manager of one of the distribution companies.⁶⁸

It can be seen, then, that the attitude of the members of the Board as well as its leadership have had a profound affect in displacing original goals.

D. ENVIRONMENT OF THE BOARD

The discussion of the loss of morale within the censorship board and its goal displacement in terms of the structure and personnel is obviously incomplete without some mention of the effect of a changing social and technological environment on the organization. An examination of Canadian society and the technological innovations which have shaped it over the past sixty years reveals a declining belief in the need of the goals originally postulated by the Board.

The rapid technological innovations in the field of communications is perhaps the most important influence on the goals of the Board. In 1911 the only means of electronic communication was the motion picture film and, to a more limited extent, the telegraph and telephone, and it was only the film which was useful for entertainment or educational purposes. Broadcasting, however, has developed rapidly over the past sixty years to effect a profound change in this situation. "Since the opening program from the first radio station was beamed into a few Montreal homes in 1918, the role of the radio and television programs in the daily life of the Canadian family has grown to startling prominence. Today radio services reach 99 per cent and television over 96 per cent of the Canadian population."⁶⁹ This factor alone could not but force a serious re-evaluation of any attempt to control public morality and standards through the media of the motion picture film.

Harold Innis in his *Empire and Communication* and his *Minerva's Owl*, as a precursor to Marshall McLuhan writes of the tremendous influence of communications on the world in general and on Canada in particular. As the Ontario community was brought into closer contact with others, the goal of maintaining a certain ethos to develop certain standards becomes virtually impossible; the world becomes, according to these authors, a "Global Village"; not only because of electronic communication but because of the written word as well. The Board was thus left controlling only one small aspect of communications and laments even today that the Canadian Broadcasting Corporation is not bound by any censorship but its own. Mr. Silverthorne commented on this situation:

They (the C.B.C.) can, and do take a restricted picture, uncut, and show it in prime time. The least they can do is show it after 11 p.m. We've still got a certain standard left in Ontario. We should preserve it, and live by some means of decency.⁷⁰

⁶⁷ *Globe and Mail*, Saturday, April 4, 1970 at 6.

⁶⁸ Interview on March 2, 1970. Other examples of governmental involvement with the film industry would be movies made for Ontario pavillions at the Worlds Fairs and Ontario Place.

⁶⁹ *Canada Year Book*, (Ottawa: Queen's Printer, 1968) 879.

⁷⁰ Walker, *supra* note 56, at 48.

At the same time that the communications revolution was making the Board's goal impossible to achieve because there was such a vast and more important area left beyond its control; advances in the studies of psychology and psychiatry were also making inroads on the Board's determination. Whereas in the 1920's and 30's psychologists and social workers, heavily influenced by a misinterpreted Freud, feared the unleashing of man's "id" by subjects that might be viewed on the screen;⁷¹ today such findings are at least being questioned and the direct relationship between scenes portrayed in films and the actions or beliefs of individuals is dubious.⁷² "The point is simply that these materials may effect different people in different ways, and the effect, if any, may also vary with the circumstances under which exposure took place."⁷³

The present Board was informed of such evidence at the "Eighth Inter-provincial Conference of Film Classification Boards of Canada" where one speaker, addressing the Boards commented:

I am not stating that I am definitely in favour of the disappearance of all censorship . . . but I do wonder, and so do many other people, if with our forbidden fruit we have not created a world of neurotics, who would certainly not increase and might even decrease if everything was available. . . .⁷⁴

A psychologist speaking at the same conference offered a similar point of view:

Most scientists seem to agree that films of violence do not directly "produce" a certain behaviour. It depends to a very high degree on the situation and the predisposition in the spectators. One of the most striking examples comes from Redle, (as quoted in Schramm and others *Television and the Lives of our Children*). Redle found, when he was working with the delinquent and disturbed children, that the "nice" and "sweet" family programs were the ones that caused his children to lie awake or have bad dreams.⁷⁵

These points of view, it should be noted do not destroy the whole rationale of cinema censorship as expressed by Clor and others; nor do they make less meaningful the objective to create a Canadian national identity apart from the American melting pot, as a part of that rationale. It is suggested however that this scientific attack on censorship is simply another face of a hostile environment which encouraged the Board to run to the bosom of the industry.

Perhaps the most important influence in creating that unfriendly environment is the view of society in general. Once again it is impossible to ascertain by accurate analysis what proportions of society in the Board's early life favoured censorship as compared to contemporary times however certain indices can be used. The popular press is one such indice and although no systematic study was made certain general observations can be made.

In reality there seems to be a sharp contrast between the press' point of view before the 1930's and the more contemporary period of the Board. Both the *Globe*, and *The Mail and Empire*, Toronto's two largest newspapers,

⁷¹ Treasury Department Records 1-8, Box 3, Motion Picture Censor's File 2, Report of Meeting of the Boards 1928.

⁷² President's Commission on Obscenity and Pornography, (Washington, 1971).

⁷³ R. Cairns, *Sex Censorship* (1961-62), 46 Minn. L. Rev. 1009 at 1034.

⁷⁴ Y. Prevost, *Youth and Phenomenon of Violence in the Cinema*, (1969).

⁷⁵ D. Marie-Andrée Bertrand, *Film Violence and Juvenile Delinquency*, *supra* note 5.

supported and approved the formation of the Board in 1911⁷⁶ and it would seem that such support had not dwindled by the late 1920's. In *MacLean's Magazine*, November 1, 1925⁷⁷ a full page article was devoted to the support of the Board. The article argued the need for the Board not only to protect Canadian society from Americanism but also to protect its standards and individuals. *The London Free Press*⁷⁸ also expressed approval of the Board's activities and stated in an editorial that both the Treasurer and the Board were to be commended.

In contrast to this, is today's press, which the Board feels is constantly attacking and questioning the need for the Board and putting it in a bad light.⁷⁹ The Board keeps a scrapbook of the views expressed in the Toronto journals. Those views are invariably hostile.⁸⁰ A recent article in the *Weekend Magazine*⁸¹ should illustrate sufficiently the attitude of the press. The piece entitled *Censored-Keep it Clean*⁸² indicated the public's attitude towards censorship generally. It quoted from famous Canadians—Kildare Dobbs, Dorothy Cameron, Alan King—all victims of censorship, who opposed it. The article referred to the Danish and Swedish experience to indicate that censorship was unnecessary.

In many ways, then, the Board is the victim of a society in which more and more people believe censorship is no longer necessary. This also seems to affect the legislature, and there is, therefore, no great pressure on the government or the Minister to ensure that the Board plays an important and meaningful role.

E. CO-OPTATION

This discussion has attempted to indicate, although imprecisely, the forces outside the Board which might affect its performance. Blau and Scott point out that an organization is affected profoundly by its social context; that influences seep from that social environment into a board as though through a semi-permeable membrane.⁸³ It is suggested that changes in technology and psychiatric theories, as well as the general attitudes of the public have been formative influences in deterring the Board from its goal. This can be seen in the changes that have occurred in the work flow processes of the Board.

It is by examining this aspect of the Board that reasons can be seen for the Board espousing the goals of industry. It would seem that because of the change in environment, and because of lack of leadership from government, the Board, in an uncertain and hostile world moved, to ally itself with the industry it sought to regulate.

⁷⁶ *Mail and Empire*, Saturday, March 11, 1911 at 4; *Globe*, Saturday, March 11, 1911 at 3.

⁷⁷ R. Laid, *The Board of Censors*, *MacLeans Magazine*, November 1, 1925 at 29.

⁷⁸ *London Free Press*, February 7, 1928.

⁷⁹ Interview with a censor on March 5, 1970.

⁸⁰ Scrapbook in the Censor Board's files.

⁸¹ Distributed in Toronto by the *Toronto Telegram*.

⁸² *Weekend Magazine*, Vol. 20 #1 March 14, 1970, at 5.

⁸³ Blau and Scott, *Formal Organizations* (San Francisco: Chandler Publishing Co., 1962) 198.

This phenomenon is described by Philip Selznick in *T.V.A. and The Grassroots*⁸⁴ as an organizational response to an organizational need. The need of any organization, Selznick argues, is the need for "the security of the organization as a whole in relation to social forces in its environment,"⁸⁵ and that in order to obtain such security, co-optation, which is defined as "the process of absorbing new elements into the leadership in the policy-determining structure of an organization as a means of averting threats to its stability or existence",⁸⁶ results. It is suggested that the Ontario Board is an organization which responded to a need for security by co-optation.

Co-optation in administration is a process whereby either power or the burdens of power, or both are shared. On the one hand, the actual centre of authority (and decision may be shifted or made more inclusive, with or without any public recognition of the change; on the other hand, public responsibility for and participation in the exercise of authority may be shared with new elements. . . . The organizational imperatives which define the need for co-optation arise out of a situation in which formal authority is actually or potentially in a state of imbalance with respect to its institutional environment. On the one hand, the formal authority may fail to reflect the true balance of power within the community; on the other, it may lack a sense of historical legitimacy, or be unable to mobilize the community for action. Failure to reflect the true balance of power will necessitate a realistic adjustment to those centres of institutional strength which are in a position to strike organized blows and thus force concrete demands. . . . When co-optation is to fulfill the function of an adjustment to organized centres of institutional power within the community, it may be necessary to maintain relationships which, however, consequential, are informal and covert. If adjustment to specific nucleuses of power becomes public, then the legitimacy of the formal authority, as representative of a theoretically undifferentiated community (the 'people as a whole'), may be undermined. It therefore becomes useful and often essential for such co-optation to remain in the shadowland of formal inter-action.⁸⁷

The analysis would seem to apply to the Censor Board and its relationship with the industry. The censors when making decisions use criteria taken from the industry and indeed consult with the industry almost exclusively. This again is in stark contrast to its early years which would seem to correspond with the "growth period" that Bernstein refers to in his *Regulating Business by Independent Commission*,⁸⁸ for it was during that period that the Board actively and rigorously examined and regulated.

(i) *The Early Years—An Independent Authority*

In 1921 as pointed out earlier the Board adopted a set of standards⁸⁹ which were apparently rigorously adhered to. The pamphlet was distributed and the exchanges were asked to censor their own films before submitting them to the Board.⁹⁰ The Board then viewed the film and applied those criteria. So strict was the Board's adherence to its rules that in spite of receiving

⁸⁴ P. Selznick, *T.V.A. and the Grassroots*, Culture and Society Vol. III, (Los Angeles: University of California Publications, 1960) 261.

⁸⁵ *Id.* at 259.

⁸⁶ *Id.*

⁸⁷ *Id.* at 260-1.

⁸⁸ M. Bernstein, *Regulating Business by Independent Commission*, (Princeton: Princeton Press, 1955) Ch. 3.

⁸⁹ See *supra* note 30.

⁹⁰ Treasury Department Records 1-8; Box 1, Motion Picture Censor's File 1. Letter to the Secretary of State of Canada, January 3, 1922.

many letters from numerous individuals and veteran's groups it denied permission to exhibit the Dempsey-Willard prize-fight.⁹¹

Similarly when viewing films after the distributors had made their cuts, the Board eliminated even more scenes it felt offensive. Whereas their regulations made reference to foreign flags, an elimination was made of an American service cap, for example, in *The Great Train Robbery*.⁹² Other eliminations made by the Board in that film also show a strict adherence to its own rules.

The President of the Motion Picture Distributors Association, J.C. Cooper, also indicated that the Board was following its rules closely. In a Report in June of 1929, the acting chairman listed six films which were rejected while the President wrote the Treasurer saying that he felt only two deserved such a fate and wrote of the Board:

"My personal opinion is that the Board is governed by fear and not by either reason or knowledge. The Chairman is not Canadian and has little appreciation of the genius of North America. The other members of your Board cannot be expected to know anything about censorship."⁹³

During this period Cooper wrote numerous letters disputing the Board's decision, asking for the Appeal Board to be reinstated and complaining generally about the Board.⁹⁴

During the 1920's the Board's criteria were not static. They changed in the latter part of that decade to respond to two new problems. The first was the American gangster film and the second the influence of Americana generally. The Annual Report of 1931 noted that 642 films had deletions and 96 were not approved compared to 35 rejections in 1930. The report comments:

Gangster films, and more in which lawlessness was emphasized and the perpetration of crime portrayed in detail, were largely responsible for the increased number of film subjects not approved.⁹⁵

The Board at this time was so rigorous in its approach that, in the face of heavy opposition from the industry, it encouraged the minister to impose a quota for British and Canadian films:

Due to a preponderance of American films every screen story which includes prosecution or deals with the administration of justice portrays the American jury trial, court-room decorum and judicial procedure. . . . There is a definite tendency to leave the impression that these methods are British. The cumulative effect of such presentations is apt to give the mass mind the impression that such methods prevail in Canada. In the public interest this is undesirable. British films . . . with such themes afford a striking [balance].⁹⁶

With this point of view, Boylen as Chairman, wrote numerous letters to the Minister and film interest in Britain to encourage the adaptation of a 5% quota.⁹⁷ The Minister, by 1934 appeared to be won over and legislation was

⁹¹ *Id.* Memorandum to T.W. McGarry, undated.

⁹² *Id.*

⁹³ *Id.* Letter from Cooper to Montieth, July 24, 1929.

⁹⁴ See Treasury Department Records 1-8; File on J.C. Cooper's Letters.

⁹⁵ *Annual Report of Board of Cinema Censors* (1931).

⁹⁶ *Id.*

⁹⁷ Treasury Department Records 1-8; Box 3, Motion Picture Censor's File. Memorandum from Boylen, April 25, 1927.

passed allowing the cabinet to effect such a quota⁹⁸ but the government was turned out of office before anything could be done. The important point, however, is the action of the Board. It was not satisfied with negative standards but for a time engaged in a campaign to create a positive force in opposition to the industry it regulated, in order to fulfill its goal of protecting the values and beliefs of society.

Throughout this period of the late 1920's and early 1930's the Board maintained a list of written standards which were based on the standards of the British Censorship Board⁹⁹ and included such items as: the materialization of the conventional figure of Christ, irreverent introduction of religious subjects, painful and offensive scenes of death, scenes which would upset the racial susceptibilities of subjects of the Empire, Bolshevik propaganda, violence leading to brutality, bedroom or bathroom scenes, and stories where the sympathies lie with the criminal, among a list of about forty specific criteria.¹⁰⁰ Indeed so strict was the enforcement of the rules that flamboyant titles could not be devised for movies, so that the Board refused to allow *The Admirable Crichton* to be called *Male and Female*; *Tomorrows Bread*, to be called *The Golden Bed*, nor *The Salamander* to be called *The Enemy Sex*.¹⁰¹

Thus it can be seen that through this period of time the Board was not co-opted or influenced in any real way by the industry. If the censors had difficulty in deciding about a film, individuals involved in the letters or social and welfare activities would be called in to offer an opinion.¹⁰² The industry, it appears from the files, was not involved at all. With the support of its environment, and minister, and reinforced by its own self-confidence, the Board performed vigorously to enact and to enforce its standards.

(ii) *Old Age—The Industry's Protector*

By 1936 the list of standards had been deleted to eighteen items and Mr. Silverthorne noted in his report of that year:

. . . it might be useful to emphasize the problems of the film censorship were not quite so simple as they would appear to an observer. Regard has to be given to the standards . . . the Board has established; regard has to be given to the future as well as the past. A film cannot be judged simply as an individual item. An objectionable scene may be deleted in one film but permitted in another because the surroundings and views leading up to the particular scene, are of a more explanatory nature and must remain to preserve the continuity of the story.¹⁰³

This argument was exactly the one put forth by Cooper in the years prior to 1934 and was also found in articles taken from the industry's publications and sent to the Treasurer when the Film Distributors Association was advocating looser restrictions or self-regulation.

There are other indications that during this period the Board fell under the influence of the film distributors although no information is available as to

⁹⁸ *Id.* Memorandum from Montieth to Boylen, undated.

⁹⁹ *Id.* Letter from Boylen to Montieth, January 6, 1927.

¹⁰⁰ *Id.* Memorandum from Boylen to Montieth, September 26, 1927.

¹⁰¹ *Id.* Memorandum from Boylen, October 1929.

¹⁰² *Id.*

¹⁰³ *Annual Report of Board of Cinema Censors (1936).*

whether the exchanges participated in the censoring of films. In the ten year period from 1931 to 1941 there was a sharp reduction in the number of films altered or rejected.

	<u>Percentage Altered</u>	<u>Approved</u>	<u>Rejected</u>
1931-32	31.9	66.5	1.6
1932-33	31.6	67.3	1.1
1933-34	37.7	60.6	1.7
1935-36	18.9	80.8	.4
1936-37	17.5	82.3	.2
1937-38	19.3	80.4	.16
1938-39	14.17	85.75	.074
1939-40	8.078	91.87	—
1940-41	10.5	89.3	.005 ¹⁰⁴

It can be observed from the table that after Mr. Hepburn's intervention in 1935 a fairly dramatic change occurred. Approvals which had been in the 60% range increased, starting that year, to the 80% range, while rejections and alterations fell by 50%. It would seem likely that personality was not the only factor and that the Board was being influenced by the industry's own production code which it mentions in its reports. The Board's criteria had fallen to six standards by 1937, those standards were representative of the Code which the producers and distributors had drafted.¹⁰⁵

By the 1940's the Board has abandoned any written standards—at least none appears in its reports and for the first time reports begin to mention the co-operation existing between the distributors of films and the Board of Censors.¹⁰⁶ In 1946 on an experimental basis, and in 1947 legally and permanently the Adult Classification was institutionalized. Motion pictures, therefore, which depicted scenes of crime, murder, suicide, excessive use of alcohol, sex and domestic infidelity could be classified as adult.¹⁰⁷ By 1953 a new category was introduced: Restricted, which again allowed more to be shown with fewer cuts. This system of classification is the one used today and the one viewed by the president of a distributing company as the best method from the industry's point of view. He summarized it as follows: "Don't cut just classify!"¹⁰⁸

In carrying out this function the Board consults with the distributor of the films being cut. The film is viewed in the Board's 34 seat theatre where the footage length is projected below the film. If the censors see a scene they feel is questionable they mark down the numbers listed below so that cuts might be done if necessary. After the movie is viewed, it is classified.

One member of the Board describes the Board's work today as follows: An 'adult' classification results from some profanity, a little violence, and a little sex, whereas 'restricted' results if the sex and violence continue for a long

¹⁰⁴ *Annual Report of Board of Cinema Censors* (1941).

¹⁰⁵ *Annual Report of Board of Cinema Censors* (1937).

¹⁰⁶ *Annual Report of Board of Cinema Censors* (1945).

¹⁰⁷ *Annual Report of Board of Cinema Censors* (1947).

¹⁰⁸ Interview on March 2, 1970.

period. A cut is made where the scenes continue beyond what is allowed for the restricted categorization and a movie is rejected if it is just 'trash'.¹⁰⁹ The other members would not describe how a film is classified. But all agreed that no real standards can be developed.¹¹⁰ The 1969 Annual Report of the Board reflects this lack of any definite and detailed standards. The Report simply states that 97 films were placed in the restricted category mainly because of "language, extended sex and violence used, in our opinion, solely for sensationalism."¹¹¹ No attempt is made to lay out standards as was done in the past. Obviously the criteria used in the thirties could not be used in the 1960's or 70's, but rules might be drawn up. For example: no nude figures, no intercourse, no shots of the pubic area, and in matters of violence, no close-up shots of mutilated parts of the body, or of people being beaten, might be used as a beginning for rules to govern censorship today.

But the Board does not function as it did in the past. It no longer is the independent and aggressive body of its earlier period. As mentioned, co-optation has occurred in that industry now participates, unknown to the public, in the decision-making process. When a movie is classified, cut, or banned, the distributor is called and, if he disagrees with the Board's decision, may come and discuss it with the Chairman or Vice-Chairman. These two men effectively make all decisions, so the president of one film distributing company stated. A discussion takes place where the film distributor argues the reasons for a different classification or for not eliminating certain scenes.¹¹²

Classification is not an important problem for the distributor because a higher category, i.e. adult or restricted as opposed to general, results in better publicity for the film. The discussions, therefore, usually centre on the elimination of scenes or the banning of the motion picture. These are friendly discussions; since the Chairman has been with the Board since 1934 and the Vice-Chairman since 1929 the regulators and regulated know each other very well.

As one member of the industry put it:

It's just one big club composed of members of the Motion Picture Distributors Association, Motion Picture Theatres Association of Ontario, Variety Club and the Motion Picture Pioneers who gave the Chairman their "Pioneer" award for long and distinguished service in the industry in 1969.¹¹³

The criteria for enforcing cuts as seen in the Confidential Reports seems to be sex. In a four month period in 1969, 117 eliminations were made because of sex, and only 29 for violence while three movies were banned because of their sexual frankness. The adult and restricted categories which are decided mainly on the basis of sex and had 202 films within them as opposed to 141 general rated movies.¹¹⁴ These reports however can be deceiving.

¹⁰⁹ Interview on March 5, 1970.

¹¹⁰ Interviews with the three members who were willing.

¹¹¹ *Annual Report, Ontario Department of Tourism, Theatres Branch* (1969).

¹¹² Interview on March 2, 1970.

¹¹³ *Id.*

¹¹⁴ Confidential Reports of the Ontario Classification Board, January, June, August, March and October, 1969.

A distributor pointed out that persuading the Board to change its mind depends largely on being in the group of respected distributors such as Columbia and Warner Bros. Both he and another reputable distributor pointed out that the Chairman knows only too well the problems of the exchanges and the difficulty that good family shows have in attracting an audience. Those movies of an adult or restricted nature with frankness to them have much more appeal. For example, in one of the distributor's theatres in a smaller town *Finian's Rainbow*, (classification, 'general') drew 150 viewers on Saturday night; *Dr. Doolittle* ('general') drew 200 on Saturday night; while *99 Women—Wicked, Wicked World* ('restricted') had an audience of 320 on Sunday night and *Corruption* ('restricted') had an attendance of 327 on a Sunday night.¹¹⁵ It is this sort of information that the Board must take cognizance of in cutting and banning movies. They then allow many movies and rescind eliminations for the sake of the industry.

Other approaches have influence on the Board. The smaller distributor or independent agent may threaten to appeal to the Minister as Alan King did in *A Married Couple* which the Board originally dealt with strictly, as the film apparently did not belong to a member of the club. (The distributor was Fode Enterprises Ltd.). The Board, because of the resulting publicity, and the fact that the Board knew that the Minister did not wish to be involved in that publicity, allowed the film to pass with the elimination of five vulgar words, so that the Board could say that it had exercised some control and not allowed the exchange to have its own way completely.¹¹⁶

Another example of the Board allowing itself to be controlled by the industry can be found in *The Boys in the Band*. This film, released in 1970 in Toronto, concerns homosexuals and has language more 'vivid' than used in any previous movie shown in the city. Rather than accept cuts, the exchange persuaded the Board to approve the picture with a warning in newspaper advertisements and outside the theatre that the film's language might be offensive. This is the first time the Board has engaged in such a practice although it is now fairly common. Its previous difficult film *I Am Curious (Yellow)* was approved only after token cuts had been made.

The matter of eliminations or warnings are really unimportant except that they point out the impotency of the present Board in comparison to its younger days. They are simply indicative of the sharing of power with the industry which the Board is attempting to regulate. That industry, it would seem, is now so powerful that it is taking the initiative in forcing new methods of classification on the Board by the use of a warning, which the Board was unwilling to use up until now, for fear of giving extra publicity to films.

The Board by its classification system which demands that the rating of a movie be put in all advertisements and by this new method of publishing warnings is being used as a tool for the industry's publicity. At the same time the system, it seems, is being used by the industry for what Edelman call symbolic reassurance.¹¹⁷ Those of the public who still believe in censorship are told that

¹¹⁵ Interview on March 2, 1970.

¹¹⁶ Interview on March 5, 1970.

¹¹⁷ M. Edelman, *The Symbolic Uses of Politics* (Chicago: University of Illinois Press, 1967).

classification is for them. They are informed in every advertisement about the quality of a movie. They can therefore see tangible results of the Board's work. Those opposed to censorship are also reassured and feel the Board is working on their behalf in its more liberal approach. In reality it is industry for whom the Board toils, unknown to all.

The Board informs the individual who might complain of a movie that the restricted category forbids youths of under eighteen years of age to view the film. It does not mention however, that no check is made to ensure that 17- or 16-year-olds are being kept out. The Board instead allows the theatres to enforce the regulation and is sure that they do it properly.¹¹⁸

All these characteristics indicate that the Censorship Board is suffering from old age. Co-optation by the industry has quietly occurred through a consultation process in decision-making. Yet even the preliminary screening does not escape the industry's influence. Although no reviews are read by the censors about the movies they are viewing (for they wish to maintain objectivity); the Board subscribes to all the trade papers such as *Variety*, *Film Daily* and *Hollywood Reporter*. None of the members interviewed knew how they felt the pulse of the public they were trying to serve. There was no systematic research of how the Board's decisions were accepted by the public or what the public felt the Board should be doing. It does receive letters from the public, but these, although answered, do not apparently play a part in the Board's decisions.

What seems to be important, are the trade papers. Scrapbooks are kept by the Board from those journals, regarding censorship in the industry. The Vice-Chairman indicated that the Board looks to these for guidance. For example, he commented that numerous articles had appeared about violence and censorship and showed a scrapbook with an article from the *Film and Television Daily*, the lead line of which read "Anti-Violence Support Grows".¹¹⁹ It is this type of thing, he stated, that influences the other members of the Board.¹²⁰ Those other members, however, have not been trained for their task of censorship. One with a B.A. in Political Science from the University of Toronto, was in business and when he quit that occupation his life-long friend, the Chairman, asked him to come to the Board. The only female censor, is the widow of the former Minister of Education, while the newest member was with Paramount Pictures before he came to the Board.¹²¹ This latter addition seems to indicate further inroads made by the industry. The Board's only dealings and information about censorship, of necessity, comes from the industry and trade magazines. Although there is a conference of Canadian censors, it is held only every two years and does not seem to be of great influence. The members are therefore forced to obtain their information from the film distributors' media.

There are no communication links with the public, which the Board is supposedly serving by the original legislation. There are no other sources of information or power to counteract those of the film industry; thus the Board

¹¹⁸ Interview on March 17, 1970.

¹¹⁹ *Film and Television Daily*, Vol. 132, # 114, Thursday, January 13, 1968.

¹²⁰ See *supra* note 38.

¹²¹ Interview on February 26, 1970.

has come to ally itself with the industry more and more. It is afraid to speak with the press and tries to avoid any contact with its environment. Isolated from a seemingly hostile world, it works with the film industry while sending out nebulous statements such as General, Adult and Restricted to let the public know that it is still alive and well.

The Board performs little work of value for society today. It does not attempt to encourage a Canadian identity through a Canadian film industry, it does not seek to protect; indeed, it does nothing which comes close to its original goal of protecting and maintaining the social fabric. It does however protect the industry. Once a film is censored the morality squad does not interfere with it at all. There is no danger of charges under the Criminal Code.¹²² An inspector of the Morality Squad of the Metropolitan Toronto Police Department, said that although the police department has the authority to act, it does not, if a movie has been censored.¹²³ The industry then is the only group which seems to receive real benefits from the Censors. It is not surprising therefore, that no appeals from the Board have been made in recent years. Industry participates in the decision-making of the Board, and receives tangible benefits from its very existence.

F. PROPOSED REFORM OF THE BOARD

In light of this analysis an examination may be made of prospective legislation to reform the Board in accordance with the McRuer Report. The draft legislation's main thrust is to the rights of the individuals appearing before the Board. It presupposes that these rights may be trampled on and that adequate appeal measures are necessary. It therefore recommends the Board's decisions be given in writing if requested within ten days of the viewing of a particular film and that "any person who deems himself aggrieved by a decision of the Board or any member of the Board may within 10 days after receipt of the written decision, appeal in writing to the Minister for a review of the decision."¹²⁴ The review board the Act suggests, would be an advisory committee consisting of a chairman and not less than four other persons who shall be appointed by the Lieutenant Governor in Council from persons who are not members of the Ontario public service.¹²⁵

The Board's comments to the Attorney-General's Department about this tentative legislation stated that this Board was generally in favour of such reform. The only serious question was the power of the advisory committee, and whether it might develop into a policy making body and usurp the censor's function, but this is unlikely since the Minister would have the final decision. Other problems which the Board saw in the legislation were minor, as who

¹²² *Id.*

¹²³ Interview on March 3, 1970.

¹²⁴ Tentative Revision of Theatres Act, Sec. 4, Censor Board Files.

¹²⁵ *Id.*

would pay the cost of an appeal; it is therefore likely that this legislation will be adopted.¹²⁶

Its effect, in light of the above analysis, should be negligible. There have been no appeals that have reached the Minister in recent years so that such an appeal committee is superfluous. Secondly, those appearing before the Board have already an effective voice in the policy-making and decision-making of the Board so that they would not likely use such a committee. The McRuer Report does not really therefore go to the problems involved in the regulatory body. The appeal procedure with all its judicial requirements of a fair hearing, and, of the parties to be the appellant and, of the Director of the Board to be the respondent will be irrelevant to what is actually occurring; for all real decision-making will be dealt with by agreement between the Board and the exchange, which are bound together in a symbolic relationship; the industry giving the Board a reason for existence and the Board giving the industry protection and regulation. Were this a rigorous and aggressive Board such appeal procedures would be warranted and necessary to prevent the Board from arbitrarily exercising its power. If this Board were even strong enough that it could refuse the demands of those distributors not within the club some use might be made of the procedure. Although, if that were so those who appealed would be at a disadvantage, for presumably they would not have effective control over the advisory committee as the reputable exchanges do over the Board. Statutory rights and appeal procedures to a higher tribunal or the courts are not a meaningful solution to the problems of any board in such a state of co-optation.

Kenneth Culp Davis in his *Discretionary Justice*¹²⁷ has an approach similar to McRuer regarding the control of administrative bodies. As McRuer he advocates the checking of discretion by review from above; the irrelevance of this has already been seen. However, he also postulates open hearings so that the public might see how a board operates, and how it exercises discretion. Considering the hostile environment of this Board it is dubious that any such disclosure would alter substantially the relationship between the Board and the film distributors except perhaps to encourage them to make it more covert. As well, the problem of showing pornography to the public so that they might understand the Board's decision-making process is of dubious practicality. Lastly, it is doubtful that there is enough legitimate public interest and concern which would result in any meaningful observation. All this would seem to indicate, that public hearings would do little. In its early days the Board was very open and often called in interested spectators to consider films. Such a

¹²⁶ Interview on March 17, 1970.

On July 13, 1971 the Ontario Legislature gave third reading to the *Civil Rights Statute Law Amendment Act*, Bill 56, 4th Session, 28th Legislature, Ontario, 20 Elizabeth II, 1971. Section 82 of that act amended *The Theatres Act*, R.S.O. 1960 C. 396 in keeping with the McRuer Report but the amendments were only in relation to the licencing of projectionists and exchanges, where licencing was required for health and safety reasons and therefore the revisions referred to in the text have not been implemented; furthermore an *Act to provide A Single Procedure for the Judicial Review of the Exercise or the Failure to Exercise a Statutory Power*, Bill 54, 4th Session, 28th Legislature, Ontario, 20 Elizabeth II, 1971 does not affect appeals from the decision of the censors unless those appeals could have been made under a prerogative writ.

¹²⁷ K.C. Davis, *Discretionary Justice: A Preliminary Inquiry*, (Baton Rouge: Louisiana State University Press, 1969).

practice did not prevent it from falling prey to the interests of the industry. Public observation is an indication of the Board's vitality rather than its cause.

Davis' most important recommendation is perhaps the restriction of discretion by written rules, not established by the Legislative or Executive Branch of government, but by the Board itself, so that individuals have a clear idea of the criteria used and can prepare their case accordingly. This is exactly the method used by the Board in its early years, and as it matured and declined, it abandoned this written criteria. It is dubious whether a requirement to maintain such rules would have preserved the original vitality of the Board for its decline was not as a result of an abandonment of these rules but of more profound changes in society and government. It should be noted as well that any such board must adopt to changing fashions to some extent at least. The prohibition of the exposition of a thigh in 1930 cannot be a rule in the era of the mini skirt, so that written standards in such a field would be changing constantly and difficult to enumerate.

In many ways such standards are irrelevant as well, for at least with respect to the Censor Board the industry "pretty well knows what the Board will okay."¹²⁸ Often they censor their own movies before submitting them for classification. The distributor knows under what circumstances a scene displaying the pubic area will be approved, and what he might persuade the Board to accept. Written criteria are therefore superfluous for the parties involved, those whose rights are supposedly endangered already know the standards as they have helped develop them; discretion is thus already defined.

Traditional administrative law has looked at the protection of the individual against the power of the bureaucracy and therefore has looked for methods to restrain and control the exercise of its discretion. It would seem from the examination here that this focus must be changed. It may be relevant when a bureaucratic organization is vigorous and vital and thus ignores individual rights; it may also be relevant to a board which has suffered from goal displacement but is not co-opted by the regulated, as a welfare agency; it does not seem to be a relevant approach, however, when the board and those it regulates are in a symbiotic relationship each giving aid and sustenance to the other.

CONCLUSION

In the case of the Censor Board the reasons for its goal displacement have been enumerated; the structure and personnel within the Board and the changes in the Board's environment were the most profound influences. The changes in technology and superficial social customs are beyond any control and therefore reform must focus on the structures, personnel, methods of achieving goals and the goals themselves.

The individuals required to staff modern agencies should be expert and skilled in their task with a belief in its work. Political and friendship appoint-

¹²⁸ Interview on March 2, 1970.

ments are not sufficient to give the personnel required for such organizations. If needed, training should be given in the area of the Board's activity. With censorship's goal of maintaining certain basic standards to weave the fabric of society, however, this type of training and skill seems impossible. Perhaps the only person so well equipped would be Plato's Philosopher King. Although the early appointees with a vision and belief in the type of society that closely corresponded to the government's seemed to succeed to a fairly high degree in performing their task of censorship, they never came close to achieving their goal of a separate Canadian society with values above those of violence, brutality and physical passion. Their goal was unattainable.

Similarly recommendations can be made regarding the method of performing censorship. To counteract the industry's power, perhaps the Board should hear presentations from social welfare agencies, school boards and concerned parents, and thus act as an arbitrator or conciliator between two groups of equal power. If it did this it is still doubtful that its original goal would be achieved. Because the fabric of Canadian society is interwoven with that of the American, such a method would not alter the situation. Control over all communications and information would be required in order to control the ethos of the community. An open society cannot allow such activity.

The Board could be made independent of its minister and allowed, as it wished to do, to establish quotas for the viewing of Canadian films as the Canadian Radio and Television Commission controls the content of the television and radio networks. But no matter how independent and strong, the Board could not force individuals to accept and believe in the values it attempts to put forth, be they nationalistic or moralistic.

Reform of structure, methods, and personnel are some methods of maintaining a board's life and vitality, but these are not sufficient by themselves in a hostile and changing environment. The goals which that organization is seeking to achieve must be attainable. It would seem censorship's goal was not. Rapid changes in technology made it difficult; Canadian and British political traditions stemming from Locke, and Mill made it undesirable; society's lack of awareness or concern about those values or the qualities of character which bind it together made it doomed to failure.

All these factors are beyond human and governmental control. It is only by looking at such considerations as these that one can discover if a goal is possible to achieve. If it is not, more limited goals should be found, or the Board dismantled. The Censor Board's original goal was unattainable; it thus responded by choosing the goal of classification which is unimportant. The Board should be discarded for its dream of a distinctive Canadian society is surely an impossible dream.

